

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0542

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective January 1, 2023 (decision # 100738). Claimant filed a timely request for hearing. On April 21, 2023, ALJ Lewis conducted a hearing and issued Order No. 23-UI-222928, affirming decision # 100738. On May 11, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Outsiders Inn employed claimant in their human resources department from July 18, 2022 until January 5, 2023. Claimant was regularly scheduled to work Monday through Friday.

(2) During much or all of his employment, claimant was experiencing housing insecurity.

(3) Per their attendance policy, the employer required employees to arrive to work on time every day, or else to contact a supervisor as soon as practicable when they know they will be late or absent for a shift. Claimant was aware of and understood these expectations.

(4) Claimant performed much of his work for the employer on his own personal laptop, and did not use a computer issued by the employer, although the employer could have made one available to him for some of the time that claimant was employed.

(5) During the course of his employment, claimant incurred a number of absences. The employer warned claimant about his attendance several times.

(6) At some point prior to December 15, 2022, claimant pawned his laptop in order to pay for lodging. On that occasion, claimant's supervisor told him to stay home because the employer did not have work for him other than computer work.

(7) Claimant last performed work for the employer on December 15, 2022. At that point, claimant took time off of work in order to secure housing after his previous housing situation fell through. Claimant

cleared this absence with the employer, and did not maintain daily contact with the employer during this time.

(8) On Monday, January 2, 2023, claimant messaged his supervisor to let her know that he had again pawned his personal laptop, and that he was willing to come to work regardless, but was not sure if there would be work for him to perform without a computer. Claimant did not receive a response to his message. Because the employer did not respond to claimant and because his supervisor had previously advised him to stay home when he was not able to perform work on his computer, claimant assumed that the employer expected the same from him in this instance. Based on a recent communication from his supervisor, in which she told him that they had no spare computers to assign to him, claimant believed that the employer did not have any spare computers they could assign to him to perform his work.

(9) Claimant did not report to work, or contact the employer, on Tuesday, January 3, 2023, or Wednesday, January 4, 2023 because he believed that the employer had no work for him to perform while his laptop was unavailable. Claimant did not contact the employer on these dates because he had already notified the employer that he did not have his computer when he contacted them on January 2, 2023, and because he had not been required to contact them on a daily basis while he was off work in December 2022.

(10) On January 5, 2023, the employer discharged claimant because he had not reported for work or contacted them to notify them of his absences on January 3 and 4, 2023.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (September 22, 2020). “[W]antonly negligent” means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he was absent on January 3 and 4, 2023 and did not notify them of his absences on those days. The order under review concluded that this constituted misconduct because claimant knew the employer’s attendance policy, and furthermore concluded that claimant’s conduct was not a good faith error “because it is not plausible that claimant would believe that employer would approve of or condone of him not notifying employer that he would not work his scheduled shift.” Order No. 23-UI-222928 at 3–4. The record does not support these conclusions.

The record shows that claimant contacted the employer on January 2, 2023 to inform them that he had pawned his laptop, that he did not have a computer he could use for work, and that he was willing to work but uncertain as to whether he could work at all. The record also shows that the employer never responded to his message. At hearing, one of the employer's witnesses testified both that there was non-computer work that claimant could have performed at that time and that, regardless, the employer could have assigned claimant a spare computer at that point in time. Transcript at 38, 39. Thus, claimant's reason for staying home from work on January 3 and 4, 2023 was due to his own erroneous understanding of the work and equipment available to him.

Nevertheless, the record shows that claimant's absences on those two days, and failures to report the absences to the employer, were, at worst, good faith errors. As to the absences themselves, the most recent information that the employer conveyed to claimant was that they did not have non-computer work available for him, and that they did not have any work computers they could assign to him. Even if this information was outdated or inaccurate, the employer did not contradict claimant's assertions that this was the most recent information given to him. Thus, claimant had a reasonable basis for his erroneous beliefs.

Regarding the failure to report the absences on January 3 and 4, 2023 to the employer, the record shows that claimant had a reasonable basis for believing that he was not required to report his absences to the employer on a daily basis. At hearing, claimant testified that while he was aware of the employer's attendance policy, the employer did not "really follow their policies," and had "no consistency in enforcement" of those policies. Transcript at 23. The employer did not contradict this testimony. Furthermore, when claimant contacted the employer on January 2, 2023 to inform them that he had pawned his laptop, he had already been off work for more than two weeks. When he initially took time off work in mid-December 2022, the employer did not require claimant to keep in touch on a daily basis during the course of his absence. Given both his observance of the employer's inconsistent enforcement of their own attendance policy, and the fact that he had not been required to contact the employer daily during his recent period of absence, it was reasonable, though erroneous, for claimant to believe that he was not required to contact the employer about these last two absences.

Because claimant had reasonable bases for concluding both that the employer had no work for him to perform while he did not have access to his personal laptop, and that the employer did not require daily contact from him during his absence, claimant's failure to notify the employer of his absences on January 3 and 4, 2023 was the result of good faith errors. Therefore, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 23-UI-222928 is set aside, as outlined above.

S. Serres and D. Hettle;
A. Steger-Bentz, not participating.

DATE of Service: June 16, 2023

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem,

Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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